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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

PEGGY KEARNS,

Petitioner,

v.

KATHY COMBA and ALAN ROGERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, on a motion for summary judgment based upon qualified immunity in a 42 U.S.C. § 1983 case, a plaintiff's burden to demonstrate a constitutional violation under clearly established law is triggered where the moving party fails to argue that the facts construed in a light most favorable to plaintiff rule out a constitutional violation under clearly established law, as required under *Saucier v. Katz*, 533 U.S. 194 (2001), and instead argues a merits analysis under pre-*Saucier* authority, which no longer presents the proper analysis for qualified immunity.

If not, whether the district court and the Ninth Circuit erred in construing the Petitioner's failure to oppose the application for qualified immunity as a confession to the merit of the qualified immunity motion for summary judgment, and a waiver of any argument on appeal.

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OPINIONS BELOW

The unreported opinion of the Ninth Circuit dated October 23, 2007, is set forth in Appendix A. The unreported District Court order dated September 27, 2005 is set forth in Appendix B.

JURISDICTION

The Ninth Circuit denied a timely petition for rehearing on December 5, 2007 (Appendix C). This Court has jurisdiction under 28 U.S.C. § 1254(1).

SUMMARY OF ARGUMENT AND STATEMENT OF FACTS

This case presents an important opportunity to issue precedent on an important federal question. This case presents an opportunity for this Court to clarify the moving party's burden on a motion for summary judgment generally and in particular in the qualified immunity context. Providing more clarity will assist Circuit Courts of Appeal and district courts in the ongoing effort to navigate this complex area of civil rights jurisprudence.

There does not appear to be a split of authority among the Circuits, at least in stark terms, on the questions presented. This Court has developed its qualified immunity jurisprudence with some care, in some twenty five cases over the years.[1] This case

1. *See* Chaim Saiman, *Article: Interpreting Immunity*, 7 University of Pennsylvania Journal of Constitutional Law 1155 (Cont'd)

presents an opportunity to truly dovetail that jurisprudence with this Court's summary judgment jurisprudence in a way that clarifies the moving party's burden of production in making a qualified immunity motion for summary judgment, and in turn, pinpoints when a plaintiff's burden in opposing qualified immunity is triggered.

Respondents moved for summary judgment on Petitioner's §1983 First Amendment retaliation claim, with an argument for the application of qualified immunity under the caselaw predating *Saucier v. Katz*, 533 U.S. 194 (2001). *Saucier v. Katz* changed the qualified immunity analysis. Petitioner's obligation to oppose this outdated argument had thus not been triggered under Rule 56 jurisprudence, namely, *Celotex v. Catrett*, 477 U.S. 317 (1986). The district court nonetheless construed the lack of opposition as a confession to the merit of the qualified immunity argument, and granted summary judgment. App. B.

Petitioner argued to the Ninth Circuit that her obligation to oppose the motion had not been triggered because of the use of outdated authority and analysis. The Ninth Circuit affirmed, declaring "Defendants' failure to cite *Saucier v. Katz*, 533 U.S. 194 (2001), in their moving papers did not render their qualified

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(Cont'd)
n.2 (2005) (listing cases); *Scott v. Harris*, __U.S. __, 127 S.Ct. 1769 (2007); *see also* Alan K. Chen, *Article: The Facts About Qualified Immunity*, 55 Emory Law Journal 229 (2006); Alan K. Chen, *Article: the Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 American University Law Review 1 (1997).

immunity argument a nullity and in no way excused Kearns' lack of response." App. A.

Petitioner had no obligation to present such an argument because the moving party had not carried its burden on a Rule 56 motion. Fed.R.Civ.P. 56(e). Both the district court and the Ninth Circuit should have denied the motion, or at least should have conducted the analysis under *Saucier v. Katz*, regardless of a failure to oppose, because both courts had an obligation to correctly apply the law. The Petition should be granted and the decision below reversed and the case remanded for trial in the district court. This Petition is timely filed from the Ninth Circuit's denial of petition for rehearing filed December 5, 2007. App. C.

REASONS FOR GRANTING THE PETITION

Saucier v. Katz, 533 U.S. 194 (2001), set forth a new test for qualified immunity. This Court differentiated its new analysis from that set down in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (objective test with resolution at summary judgment stage based upon whether law was "clearly established") and *Anderson v. Creighton*, 483 U.S. 635 (1987) (same). The new test separates the qualified immunity analysis from the merits analysis. 533 U.S. at 194-5. The test under *Saucier v. Katz* is thus two-fold. First, construing the facts in a light most favorable to the plaintiff, was there a constitutional violation? 533 U.S. at 201. Second, if there was a constitutional violation, was the law so clearly established that no reasonable officer could have believed his or her conduct lawful? 533 U.S. at 202. Respondents did not present any

argument for the application of qualified immunity under the two pronged approach.

Qualified immunity is an affirmative defense to suit. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Here, the defense was not asserted until summary judgment, at the end of the brief, and it was not supported by relevant argument. Respondents did not discuss the facts in a light most favorable to Petitioner as to whether a constitutional violation existed, nor did they tackle the second prong of the *Saucier v. Katz* analysis.

Celotex, supra, set down the obligations of a party moving for summary judgment. The moving party must show the absence of any genuine issue of material fact in the record. *Id.* Summary judgment is appropriate under Rule 56(c) only where the moving party demonstrates the absence of genuine issue of material fact and entitlement to judgment as a matter of law. Fed R. Civ. P. 56(c); *Celotex*, 477 U.S. at 322. The moving party must first identify those portions of the record demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 324. A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the non-moving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S 144, 159-60 (1970). In the Ninth Circuit, this is true even where there is no opposition to the motion. *Martinez v. Stanford*, 323 F.3d 1178, 1182 (9th Cir. 2003) (so holding on a qualified immunity motion for summary judgment). Unfortunately for Petitioner, the Ninth Circuit disagreed

in this instance. But this unfortunate situation presents an opportunity to correct course here, while advancing qualified immunity summary judgment case law.

In the qualified immunity context of today, the first step in any moving argument is an assertion which, if accepted as true, would allow the district court to rule as a matter of law that there was no constitutional violation. No such argument was presented below to the district court. Petitioner's obligation to oppose the motion was not triggered because the moving party had not carried its burden of production as the movant to show the absence of any issue of material fact as to whether, construing the evidence in a light most favorable to Petitioner, there was no constitutional violation. To construe a lack of opposition under this circumstance as a confession to the merit of the outdated immunity argument is to ignore the mechanics of Rule 56, especially in the context of qualified immunity.

Had Respondents complied with their Rule 56 obligation as to the first element of the *Saucier* analysis, then it would be clear that Petitioner had an obligation to come forward and argue why the facts, construed in a light most favorable to Petitioner, gave rise to a constitutional violation. Petitioner would then have had to take the second step and establish that the law concerning this violation was clearly established at the time.

At the Ninth Circuit, Petitioner argued that the district court erred in construing the lack of an opposition as a confession to the merit of the qualified immunity defense. Petitioner went further, however, and

argued under *Saucier v. Katz*, based upon the record below. The Circuit refused to consider this argument, having determined that the failure to argue it below constituted a waiver of any argument on appeal. App. 2. The Circuit failed to consider it had earlier declared that even with no opposition, the district court and thus the appellate court had a duty to analyze the qualified immunity argument. *Martinez, supra*. After all, the district court noted that had it reached the issue, it would have granted immunity under a pre-*Saucier* case. App. B at 3:17-21.

The Ninth Circuit failed to consider its exceptions to the waiver doctrine, where, as a matter of law, the analysis in the moving papers was unsupported by law, and where, applying the appropriate analysis, summary judgment should not have been granted.

> "This rule [concerning waiver of arguments for appeal] is merely a rule of practice, however, and can be relaxed where, for example, significant questions of general impact are raised; injustice might otherwise result; plain error has occurred; resolution of the new issue is purely a matter of law and does not rely upon the factual record developed by the parties; or a new theory has first come to light during the pendency of the appeal because of a recent change in the law."

Guam v. Okada, 694 F.2d 565, 570 n.8 (9th Cir. 1982). The Ninth Circuit's failure here is of no moment to the

questions presented. It is noted because this presents an alternative course, in that if the Petition is granted, this Court could remand for consideration of the merits of the qualified immunity analysis.

In closing, another anomaly below may be worth observing. The district court failed to apply the more applicable portion of the Local Rule: "The failure of the moving party to file points and authorities in support of the motion shall constitute consent to the denial of the motion." Local Rule 7-2(d), U.S.D.C., District of Nevada.[2] The failure to cite to and apply the relevant precedent is the equivalent of a failure to file authority for the requested relief. Respondent's failure here constituted a waiver of the defense below and a waiver of any argument about it on appeal. Viewed this way, any waiver doctrine should apply to Respondents, not Petitioner, making the preferable approach upon granting the Petition issuance of an order remanding the cause for trial in the district court.

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2. The district court granted qualified immunity on the entire §1983 claim, including the prayer for injunctive relief.

CONCLUSION

For these reasons, the Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 23, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-16963

PEGGY KEARNS, an individual,

Plaintiff - Appellant,

v.

KATHY COMBA, an individual; et al.,

Defendants - Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted October 18, 2007.**
San Francisco, California

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously granted Appellant's Stipulated Motion for Submission on the Briefs on September 21, 2007 upon finding this case suitable for decision without oral argument pursuant to Fed. R.App. P. 34(a)(2).

Appendix A

Before: BRUNETTI, W. FLETCHER, and CLIFTON, Circuit Judges.

Peggy Kearns appeals an order of the district court granting summary judgment in favor of Defendants Kathy Comba and Alan Rogers. We affirm.

By failing to respond to Defendants' qualified immunity argument below, Kearns waived the opportunity to oppose it for the first time on appeal. We do not consider Kearns' argument because it was not "raised sufficiently for the trial court to rule on it." *Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir.1996); *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir.1989). The district court properly exercised its authority to enforce its local rules, *see* 28 U.S.C. § 2071; Fed.R.Civ.P. 83; *Zambrano v. Tustin*, 885 F.2d 1473, 1479 (9th Cir.1989), which provide that failure to respond to a motion constitutes consent to granting the motion, *see* D. Nev. Rule 7-2(d). Defendants' failure to cite *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), in their moving papers did not render their qualified immunity argument a nullity and in no way excused Kearns' lack of response.

Kearns also cannot succeed with respect to her state law claim. Like the district court, we conclude that Kearns did not show that any of the actions allegedly taken by her employer violated the public policy of Nevada, *see Dillard Dept. Stores, Inc. v. Beckwith*, 115 Nev. 372, 377, 989 P.2d 882 (1999); *Wayment v. Holmes*, 112 Nev. 232, 236, 912 P.2d 816 (1996), or that her working

conditions were so intolerable that a reasonable person in her position would have felt compelled to resign, *Martin v. Sears, Roebuck & Co.*, 111 Nev. 923, 925-26, 899 P.2d 551 (1995).

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA FILED SEPTEMBER 27, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-03-0207-LRH (RAM)

PEGGY KEARNS, an individual,

Plaintiff,

vs.

KATHY COMBA, an individual,
ALAN ROGERS, an individual,

Defendants.

ORDER

Presently before this Court is a motion for summary judgment (Docket No. 24) brought by Defendants. Plaintiff has submitted an opposition (Docket No. 28), to which Defendants subsequently replied (Docket No. 29).

After reviewing the relevant pleadings, exhibits and law, the Court makes the following disposition:

Appendix B

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Peggy Kearns filed a complaint against her supervisor, Kathy Comba, and her manager, Alan Rogers, in their individual capacities. Plaintiff brought two claims for relief: (1) violation of her First Amendment rights and (2) tortious discharge under Nevada state law. Defendants have moved for summary judgment on these claims.

Plaintiff was employed with the Department of Motor Vehicles and Public Safety. On October 17, 2001, Plaintiff filed a grievance alleging poor working conditions and potential problems with the way the department was operated. Specifically, Plaintiff complained that she had been singled out in a training session through her work procedures being identified as improper. Plaintiff 's grievance was handled internally and resolved.

Plaintiff contends that as a result of this grievance, she was retaliated against in her employment. To support her allegation, Plaintiff points to several incidents she believes were a direct result of her grievance. First, Plaintiff alleges she received several letters of instruction, a non-disciplinary directive on how to complete assigned tasks that is not kept in the employee's personnel file. These letters were said to be issued on March 8, September 6 and December 6 of 2002, as well as July 25 and May 20 of 2003. Only the September 2002 and May 2003 letters have been attached to any of the motions. Next, Plaintiff complains that she

was required to keep a computerized task list in a shared folder for review by her supervisors, even though every employee under her supervisor was also required to do so. Further, Plaintiff decries the fact that she was required to attend weekly status meetings and have monthly evaluations of her work starting in September of 2002. Plaintiff also contends that her office computer, provided by her employer, was accessed twice while she was on extended leaves from work in July and October 2002. Plaintiff found unknown links in her folder of favorite internet links and realized that her e-mail account had been accessed. Plaintiff reported these occurrences to Internal Affairs and her hard drive was eventually brought in for evaluation. Defendants argue that her computer was accessed by a computer specialist to place an away message in her e-mail program because complaints had been coming in that Plaintiff was not responding to her e-mails. No action by Internal Affairs has been reported to the Court concerning the results of their evaluation. Finally, Plaintiff states that she was reassigned to work in the Training Division after she reported her computer issues to Internal Affairs, then was transferred back to her original position in the Technology Division in March of 2003, prior to the investigation into her computer problems was complete.

Plaintiff's employ ended when she resigned voluntarily from her position on August 6, 2003. Plaintiff's letter of resignation voiced no complaints over her previous employment, listed several of her accomplishments, and specifically stated that she was resigning to pursue training for a career in computer forensics.

Appendix B

LEGAL STANDARD FOR SUMMARY JUDGMENT

A court must grant summary judgment if the pleadings and supporting documents, when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue as to any material fact is only "genuine" if the evidence regarding the disputed fact is "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to preclude summary judgment]; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.*

DISCUSSION

Plaintiff's section 1983 claim alleges a violation of her First Amendment rights for the alleged retaliation she suffered after filing her first grievance in October of 2001. In their motion for summary judgment, Defendants argue that they are entitled to summary judgment as to this claim on the basis of qualified immunity (Docket No. 24 pp. 27-30). Plaintiff provided no response to this argument in her opposition. Local Rule 7-2 provides that the "failure of an opposing party to file points and authorities in response to any motion shall constitute a consent to the granting of the motion." LR 7-2(d). Although the Court would find that qualified immunity would attach to Defendants' actions, see

Moran v. Washington, 147 F.3d 839, 847 (9th Cir. 1998) (noting that the "context-intensive, case-by-case balancing analysis" required for qualified immunity analysis will rarely, if ever, mean that a right is sufficiently clearly established to preclude qualified immunity), the Court grants summary judgment for failure to respond under Local Rule 7-2(d).

Plaintiff 's remaining state law claim has been argued as either a tortious discharge, a constructive discharge, or a constructive tortious discharge. In order to prevail on a claim for tortious discharge under Nevada law, and employee must establish that (1) a dismissal (2) was based on the employee's refusing to engage in conduct that violates public policy or upon the employee engaging in conduct which public policy favors. *See, e.g., Bigelow v. Bullard*, 111 Nev. 1178, 1181 (1995). The tort of constructive tortious discharge requires proof that: (1) the employee's resignation was induced by actions and conditions that violate public policy; (2) a reasonable person would also have resigned because of the aggravated and intolerable employment actions and conditions; (3) the employer had actual or constructive knowledge of these actions and conditions and their impact on the employee; and (4) the situation could have been remedied. *Dillard Dept. Stores, Inc. v. Beckwith*, 115 Nev. 372, 377 (1999) (citing *Martin v. Sears, Roebuck and Co.*, 111 Nev. 923, 926 (1995)).

Under either of these two torts, Plaintiff must show that some action of the employer violated a strong and compelling public policy. Plaintiff has offered no

definition of the alleged public policy that was violated and has provided insufficient evidence to survive summary judgment on this point. Plaintiff's allegations include being given letters of instruction, being required to create a task list, being required to attend regular status meetings, having others access her computer while she was on leave, and being transferred temporarily between departments. None of these actions, standing alone or together, are sufficient to demonstrate that Defendants violated any strong and compelling public policy of Nevada. *See Wayment v. Holmes*, 112 Nev. 232, 236 (1996) (noting that tortious discharge actions are severely limited to cases where the employer's conduct violates strong and compelling public policy); *Sands Regent v. Valgardson*, 105 Nev. 436, 440 (1989) (holding that public policy against age discrimination was not sufficiently strong to overcome at-will employment doctrine). In fact, they do not allege violations of public policy at all. Viewed in the light most favorable to Plaintiff, at most they show that Plaintiff's working environment was difficult.

A difficult working environment will not be sufficient for a finding of constructive discharge which exists "when an employer creates working conditions so intolerable and discriminatory that a reasonable person in the employee's position would feel compelled to resign." *Martin v. Sears, Roebuck & Co.*, 111 Nev. 923, 925 (1995). The arguments raised by Plaintiff are insufficient to demonstrate intolerable and discriminatory working conditions which would rise to the level necessary to invoke a constructive discharge

argument. Plaintiff was provided with a maximum of five letters of instruction, was required, as were other employees, to provide a task list in a shared computer folder each week, had to report to her supervisors for status conferences, had her work computer accessed while she was away, and was once transferred back and forth between two departments. While some of these actions may be inconvenient or annoying, none of them are so intolerable and discriminatory that a reasonable person would feel compelled to resign.

With only these minor workplace issues alleged by Plaintiff, the Court grants summary judgment to Defendants on the remaining state law claim.

CONCLUSION

It is therefore ORDERED that the Defendants' Motion for Summary Judgment (Docket No. 24) is GRANTED.

DATED this 27th day of September, 2005.

s/ Larry R. Hicks
LARRY R. HICKS
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC FILED DECEMBER 5, 2007

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-16963

D.C. No. CV-03-00207-LRH
District of Nevada, Reno

PEGGY KEARNS, an individual,

Plaintiff - Appellant,

v.

KATHY COMBA, an individual;
ALAN ROGERS, an individual,

Defendants - Appellees.

ORDER

Before: BRUNETTI, W. FLETCHER, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges W. Fletcher and Clifton have voted to deny the petition for rehearing en banc, and Judge Brunetti so recommends.

Appendix C

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.